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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ARBIZU-TAPIA,

Defendant and Appellant.

A144479

(Solano County
Super. Ct. No. FCR300081)

Defendant Juan Arbizu-Tapia appeals from a judgment entered upon a jury verdict finding him guilty of three counts of committing a lewd act upon a child. Defendant contends the trial court denied his constitutional right to a fair trial in excusing a juror during deliberations and, if there were sufficient grounds to excuse the juror, the trial court erred in denying defendant's motion for a mistrial. We shall affirm the judgment.

I. BACKGROUND

We need not describe the evidence presented at trial, as it is not relevant to the issue raised on appeal. Evidence was presented showing that on one occasion between June 2008 and December 2008, defendant committed lewd acts upon the victim, who was 12 years old at the time. Defendant declined to testify, but witnesses gave character testimony that they never saw defendant acting inappropriately toward any family member.

The jury began deliberations on Thursday, September 11, 2014, and continued deliberating on the following day. After hours on Friday, September 12, 2014, one of the jurors left a voicemail with the court which stated: "Hi, my name is [redacted]. I'm a

juror for one of Judge Fracchia's cases right now, and I am calling because I have learned through our deliberations today some information about a juror that seems to cause unfair bias in the case. And I don't know who to contact. It is after hours on Friday, and I was not able to give a letter or anything to the bailiff. I was wondering if maybe Monday morning should I come in early, give a note to the bailiff? Please give me a call back with some advice how I should go about this."

On the following court date, the court received a note from the juror that read: "I am writing you today because of information about a juror that arose during deliberation on Friday afternoon. During conversation a juror by the name of [Juror No. 12] was confronted about some of her personal biases to which she revealed that her son was arrested and served three years as a juvenile for the same charges pertaining to the People versus Juan Arbizu-Tapia case, charges of lewd acts with a minor under 14. It is clear that [Juror No. 12's] person[al] experiences are interfering with her ability to view this case with an open mind and look at the evidence objectively. While I feel uncomfortable with this new information, it appeared other jurors had concerns as well."

The court and counsel conferred with the jury foreperson, who confirmed that, on the second day of deliberations, Juror No. 12 revealed to the other jurors that a family member had been charged with a similar offense. The court called Juror No. 12 in for questioning. Juror No. 12 confirmed that, during deliberations, she told the other jurors that her son had been charged with a similar offense.

Juror No. 12 acknowledged that she had answered "no" to the question on the juror questionnaire: "Have you, a close friend, relative or person with whom you have a significant personal relationship been involved in a criminal case?" Juror No. 12 explained that when she answered this question, she "really didn't even think about it." She said: "My son has been dead since he was 24 years old, so in deliberating then I started thinking. I said when he was a juvenile. He was 15, and then I said there was a case where he was 15 and the girl was 13 making 14. And I guess they were at the mother's home and they were doing stuff, and then the father I guess evidently came

home. So he accused my son of lewd and lascivious acts, and he was a juvenile. So I didn't think about it until after we started talking, and then that came back to me."

Juror No. 12 also acknowledged that she answered "no" when the court asked the prospective jurors "whether you, close friend, family relative or person with whom you have a significant relationship had ever been accused of a crime such as the issue that was before the Court." She said that "[i]t did not ring a bell" until after the jury began talking about the charges during deliberations. Juror No. 12 stated that she shared this with the other jurors, but did not discuss the facts of her son's case, other than that the girl involved had been tall and did not look like she was 13 or 14.

The trial court dismissed Juror No. 12, replaced her with an alternate juror, and instructed the jury to begin deliberations anew. The court concluded that Juror No. 12 had the opportunity to disclose a connection and "chose" not to do so, and that she "declined to provide that information" in response to the court's questioning. The court also noted that in describing to the court what she had told the other jurors, Juror No. 12 failed to mention she had told them the amount of time her son had served for the offense. Moreover, the court noted, the juror who had contacted the court "state[d] unequivocally that this ha[d] interfered with the deliberation process." The court denied defendant's request for a mistrial, concluding any prejudice could be cured by substituting an alternate juror.

On September 15, 2014, the jury found defendant guilty of three counts of committing a lewd act upon a child, all of which arose from one incident in which he engaged in three lewd acts with the victim (Pen. Code, § 288, subd. (a), counts 1–3). In connection with count 1, the jury found true the allegation that defendant engaged in substantial sexual conduct with the victim. The court sentenced the defendant to 10 years in prison.

II. DISCUSSION

A. Juror Excusal

Defendant contends that the trial court erred in dismissing Juror No. 12 and thereby denied him his constitutional right to a fair trial.

“A criminal defendant has a constitutional right to an impartial jury, and the pretrial voir dire process is important because it enables the trial court and the parties to determine whether a prospective juror is unbiased and both can and will follow the law. But the voir dire process works only if jurors answer questions truthfully. ‘As the United States Supreme Court has stated, “*Voir dire* examination serves to protect [a criminal defendant’s right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror’s being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.” [Citation.] [¶] A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct.’ [Citation.]” (*People v. Wilson* (2008) 44 Cal.4th 758, 822–823; see *People v. Castaldia* (1959) 51 Cal.2d 569.)

“When misconduct involves the concealment of material information that may call into question the impartiality of the juror, we consider the actual bias test of *People v. Jackson* (1985) 168 Cal.App.3d 700, 705, adopted by [the Supreme Court] in *People v. McPeters* (1992) 2 Cal.4th 1148, 1175 [superseded by statute on another point as stated in *People v. Boyce* (2014) 59 Cal.4th 672, 707]. ‘Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. “[T]he proper test to be applied to unintentional ‘concealment’ is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code [section] 1089 . . . that he is unable to perform his duty.” [Citation.] [¶] Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court. Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire

examination. [Citations.]’ ” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644 [new trial motion] (*San Nicolas*).)

We review a trial court’s decision to discharge a juror for abuse of discretion, and must uphold such decision if the record supports the juror’s disqualification as a demonstrable reality. (*People v. Williams* (2015) 61 Cal.4th 1244, 1262.)

We see no abuse of discretion in the trial court’s decision to discharge Juror No. 12. A plain reading of the trial court’s ruling indicates that it made an implicit finding that Juror No. 12 intentionally concealed her son’s history: the court noted that in response to the several opportunities the juror had to reveal her son’s similar conviction, she had “chosen” not to do so and that “in every step of the way, [Juror No. 12] declined to provide that information.”

Even if the nondisclosure was unintentional, the trial court could reasonably conclude Juror No. 12 was unable to perform her duty. (See *San Nicolas, supra*, 34 Cal.4th at p. 644.) She brought up the subject of her son’s offense with other jurors, including the subject of the punishment he had received, in violation of the court’s instructions that the jury consider only the evidence presented at trial and that it not consider punishment. Moreover, the information provided by the juror who reported the matter indicated that the jurors were concerned Juror No. 12’s personal biases were interfering with her ability to consider the case with an open mind.

Based on this record, we conclude the trial court could reasonably find that, as a demonstrable reality, Juror No. 12 had committed misconduct and was unable to perform her duty. Thus, we reject defendant’s contention that the trial court abused its discretion in dismissing Juror No. 12.

B. Motion for Mistrial.

Defendant alternatively argues that even if the trial court had good cause to excuse Juror No. 12, it erred by denying his motion for a mistrial. We disagree.

This court uses the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) “ ‘A mistrial should be granted if the court is apprised of prejudice that it judges incurable by

admonition or instruction.’ ” (*People v. Wharton* (1991) 53 Cal.3d 522, 566; *People v. Bolden* (2002) 29 Cal.4th 515, 555.) “Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]” (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) The trial judge, being present in the courtroom, is “obviously the best judge of whether any error was so prejudicial to one of the parties as to warrant scrapping proceedings up to that point.” (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 678.) A motion for a mistrial should be granted when “ ‘ ‘ ‘a [defendant’s] chances of receiving a fair trial have been irreparably damaged.’ ” ’ ” (*People v. Collins* (2010) 49 Cal.4th 175, 198–199.)

We see no abuse of discretion here. The events Juror No. 12 discussed had no connection to defendant’s case, and there is no basis to conclude the other jurors were affected by her history or bias. (See *In re Hamilton* (1999) 20 Cal.4th 273, 305–306 [when alleged misconduct involves unauthorized communication with or by a juror, presumption of prejudice does not arise unless content of communication was about the defendant’s guilt or innocence].) Indeed, the record indicated the other jurors were concerned about Juror No. 12’s bias and that one properly reported the matter to the trial court. The information concerning Juror No.12’s son does not appear to be inherently prejudicial, and we “will not presume greater misconduct than the evidence shows.” (*In Re Carpenter* (1995) 9 Cal.4th 634, 657.)

Defendant contends, however, that the trial court should have inquired further into precisely what was said by the excused juror, or by other jurors in response, during deliberations. Defendant also contends that the court erred in not inquiring into whether the remaining jurors could put the information given by Juror No. 12 out of their mind when they resumed deliberations. This argument fails. The court did inquire into what Juror No. 12 discussed during deliberations and indicated it did not wish to “get into which direction this particular jury is headed or the circumstances.” In doing so, the court properly maintained the “delicate balance between the court’s right to know about misconduct and the privacy of the deliberations.” (*People v. Barber* (2002)

102 Cal.App.4th 145, 150.) Moreover, the court instructed the jury to disregard past deliberations and begin “deliberations anew” with the alternate juror pursuant to CALJIC No. 17.51. There is no basis to conclude this instruction would not cure any possible prejudice.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Streeter, J.